IN THE

Supreme Court of the United States

October Term, 1963

No. 4

In the Matter of

SADIE H. MARKHAM,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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SADIE H. MARKHAM,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The petitioner prays that a Writ of Certiorari issue to review the proceedings in and Judgment of the Supreme Court of North Carolina entered on June 14, 1963, holding that the Superior Court of Durham County had no jurisdiction to review on *certiorari* or otherwise the failure of the City Council of the City of Durham to amend a zoning ordinance alleged to be violative of the Federal and State Constitutions. The Supreme Court vacated the Superior Court judgment affirming the action of the said City Council in refusing to enact the requested amendment, and remanded the proceeding to that Court for entry of an order dismissing the writ of *certiorari* and the petition therefor.

Opinion Below

The Superior Court of Durham County did not write a formal opinion. The Order of Clark, J., denying the respondents' motion to dismiss the petition for writ of *certiorari* to the City Council of the City of Durham, is printed in Appendix B, *infra*, p. 2a. The Judgment of McKinnon, J., affirming the action of the City Council in refusing to amend the aforesaid zoning ordinance, is

printed in Appendix B, *infra*, pp. 3a, 4a. The Opinion of the Supreme Court of North Carolina is printed in Appendix B, *infra*, pp. 5a-15a, and appears as *In re Markham* in 259 N. C. 566, 131 S. E. 2d 329.

Jurisdiction

The Judgment of the Supreme Court of North Carolina was entered on June 14, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

Questions Presented

1. Where residentially-zoned property is surrounded on two sides by commercial property, is approximately 500 feet from an interstate highway bypass on a third side, and is valueless for residential purposes, is a municipal zoning ordinance (or the action of a city counsel in refusing to amend same to permit commercial use of such property) unconstitutional as being arbitrary, capricious, unreasonable and confiscatory within the rule of *Nectow* v. *Cambridge*, 277 U. S. 183 (1928)?

2. Since the aforesaid city council in 1957 removed property directly to the east of petitioner's property from a long-standing residential zone and created a new shopping center zone, is its restriction of the petitioner's property to residential use unconstitutional, as being discriminatory and a denial to petitioner of the equal protection of the laws of North Carolina?

3. Where petitioner applied for a rezoning of her property in a residential zone in order to lease it for construction and operation of a bowling alley, and the city council during the pendency of her application amended the municipal zoning ordinance to permit operation of bowling alleys in shopping center zones like that directly opposite petitioner; and where the city authorities almost simultaneously denied petitioner's application on the ground that no additional

commercial property was needed in the area, did the city create an exclusive privilege for the benefit of the adjacent shopping center owners in violation of the Constitution of the United States?

4. May the Supreme Court of North Carolina deny petitioner a ruling on her appeal from an adverse lower court decision on the foregoing constitutional issues, and thereby deprive this Court of jurisdiction to consider and determine the validity of an ordinance alleged to be unconstitutional, on the ground that petitioner sought an inappropriate remedy under state procedure for challenging the said ordinance or the failure of a municipal body to amend it?

5. May the Supreme Court of North Carolina ignore its own precedents of long standing, where the judgment of a lower court denying a motion to dismiss a petition for a writ of *certiorari* has been held not to be appealable, and favorably entertain such an appeal by respondent here, thereby evading a decision on the constitutional questions involved in the case?

6. Was the petitioner deprived of due process of law by a decision based on untenable grounds and indicating that she must bring another action, three years after the initiation of her original action to test the validity of a confiscatory ordinance, when under the then current statutes and decisions of the North Carolina Supreme Court the procedure originally chosen reasonably seemed appropriate?

7. Is it a denial of due process of law, where the state procedure remains unclear as to the proper method for testing the validity of a zoning ordinance, to require a property owner to violate the ordinance in order to obtain a judicial determination of her rights?

Constitutional Provisions Involved

The constitutional provision involved is Section 1 of the Fourteenth Amendment to the Constitution of the United States, set forth in Appendix A, *infra*, p. 1a. The municipal zoning ordinance involved is included as part of the record (Ex. 45).

Statement of the Facts [1]

On May 18, 1926, the City of Durham, pursuant to the authority contained in the General Statutes of North Carolina, Article 14, Chapter 160, Sections 172-181.1, and the amendments thereto, adopted a zoning ordinance for the City of Durham, thereafter amended and reenacted on April 16, 1951, for the purpose, among others, of promoting the health, safety, morals and general welfare of the community. Among the classes of zones now included are C-1 (Local Community Commercial) Zone; C-1A (Shopping Center) Zone; R-8 (One-family Residence) Zone, and RA 16-24 (Apartment Residence) Zone (R. 136; Ex. 45, R. 36).

Petitioner is the owner of four separate undeveloped tracts of land north of Club Boulevard between Watts Street, as extended, and Guess Road in the City of Durham (Ex. 1-B, R. 31; Ex. 1-D, R. 31). She has owned this land since 1911 (R. 42). Tracts (1) and (2) are separated from Tracts (3) and (4), respectively, by tracts about 82.5 feet in depth that are owned by other parties (Ex. 1-C, R. 31). The four tracts are approximately six acres in size (Ex. 1-C, R. 31).

At all times since the re-enactment of the city zoning Ordinance in 1951, Tracts (1) and (3) have been included in

[1] Record references are to the pages of the printed record presented to the Supreme Court of North Carolina, copies of which are appended hereto. Exhibit numbers refer to maps, photographs, etc. filed separately from the printed record but referred to therein as designated.

Residential Zone R-8 and Tracts (2) and (4) in Residential Zone RA 16-24 (R. 43; Ex. 4-H, R. 32; R. 136-138).

The immediate neighborhood in which petitioner's property is located is predominantly commercial in character:

The developed property immediately south of petitioner's tracts, and situated in the same block on the north side of Club Boulevard, is exclusively used for commercial purposes, and includes a Shell filling station, Claudia's Grill, Shaw Paint and Wallpaper Company's showroom and warehouse and a tin warehouse for a bakery (R. 44; Exs. 4-D, 4-E, 4-F, 4-I, R. 32).

On the south side of Club Boulevard, extending in a westerly direction from Dollar Avenue past Watts Street to Buchanan Boulevard, are a solid cluster of commercial properties, including a hobby shop, Carswell's Drug Store, a Sinclair filling station, Gates' Grocery, Stanley Home Products' office building, and the office of Monroe Calculator Company (R. 44; Ex. 4-F, R. 32; Ex. 4-I, R. 32).

On the east of petitioner's property, directly across Watts Street, her Tracts (1) and (3) are bounded in their entirety by the Northgate Shopping Center (R. 45; Exs. 4-I, 28, 29, 30, 31, 32, 33, R. 35). Her property directly faces the rear of the shopping center (Ex. 4-E, R. 32; Ex. 34, R. 35; Ex. 35, R. 35).

About 500 feet to the north of petitioner's property is the U. S. 70 Highway Bypass (Exs. 28, 32, 33, 36, 38, R. 35, 36; Ex. 4-H, R. 32).

Adjoining petitioner's property, Tracts (2) and (4), on the West are three small frame houses, two of which are pictured in the record (Ex. 4-E, R. 32; R. 43). Between Tracts (2) and (4) there is one small frame house, pictured in the record (Ex. 4-C, R. 32).

Despite the residential zoning of the area there has been little or no residential development to the north and west

within the immediate vicinity of petitioner's property other than these houses (R. 43; Ex. 4-1, R. 32; Exs. 28-33, R. 35).

On June 28, 1960, petitioner applied to the Planning and Zoning Commission of the City of Durham for the rezoning of her property described above to a C-1 (Local Community Commercial) Zone (R. 37). On July 19, 1960, at its regularly scheduled monthly meeting, the Commission unanimously recommended to the City Council that the Council deny petitioner's application (R. 39-41). The minutes of the July 19 meeting read in part as follows (R. 40, 41):

> "* * * In the opinion of the Planning Director, no additional new commercial area is justified at this time, certainly not to the extent as proposed by Mrs. Markham. Mr. Brooks stated that within the area zoned C-1 at Guess Road and Club Boulevard vacant space for commercial uses is available. He stated that the use of the Markham property would be contrary to the land development plan of the City and therefore should be denied * * *.
>
> "The Commission recommends that the City Council *deny* the rezoning of this property because the Commission is of the opinion that there is sufficient space in this area now zoned for commercial purposes and that the rezoning of the property would adversely affect the proper and desirable land development in the location."

On August 1, 1960, petitioner moved for reconsideration of the Zoning Commission's action and placed before the Commission an affidavit by her setting forth the above facts with 10 exhibits attached, including photographs of the residential and commercial properties surrounding her property (R. 41-62).

On October 18, 1960, the Planning and Zoning Commission reconsidered petitioner's application (R. 87), which had been amended to include, in the alternative, a request for rezoning of the property to C-1A (Shopping Center)

Zone, in which bowling alleys had theretofore been prohibited (R. 74).

In addition to the affidavit referred to above, the Commission had before it on October 18, the affidavit of C. E. Phillips, Jr., a veteran of 26 years in the real estate business in the City of Durham, a former president of the North Carolina Association of Realtors and a director of the National Association of Real Estate Boards, who stated in his opinion that

> "* * * by virtue of the commercial developments directly east and south of her property; by virtue of the existence of the bypass on the north (to which bypass there is no access from Watts Street); and by virtue of the fact that there are no streets, water lines or other utilities and improvements within the apartment zone to the west and northwest of her property, that the development by Mrs. Markham individually of her land for apartment purposes or for one-family dwellings is economically infeasible. For the same reasons, affiant believes that her property has no substantial fair market value for lease or sale to others who would be interested in acquiring it as an investment or for development as residential property other than possibly for low class rental housing. It is the opinion of this affiant that the property has a present fair market value for commercial purposes in excess of $6,000 per acre.
>
> "Therefore, affiant is of the opinion that the continued zoning of Mrs. Markham's property for one-family dwellings, or a change in zone for apartment buildings * * * would appear to be of a confiscatory nature, in that it prevents the development of the property for its highest and best use.
>
> "It is this affiant's further opinion that the proposed rezoning of Mrs. Markham's property for C-1 commercial use will not result in economic or aesthetic disadvantage to any of the surrounding property owners; * * * that the carving out in 1957 of a substantial portion of the previously existing R-8 zone as C-1A property has left only a single R-8

> strip one block wide in the immediate area north of Club Boulevard, and that extension of commercial zoning to Mrs. Markham's property thus provides a more harmonious and consistent land use pattern in the City than presently exists * * *." (R. 78, 79)

The petitioner also submitted to the Commission on October 18 the affidavits of six other experienced realtors in the City of Durham, each of whom upon recital of the facts and upon personal familiarity with the area, corroborated the opinion of Mr. Phillips in each of the particulars quoted above (Ex. 18, R. 85, 86; Exs. 19, 20; 21, 22, and 23 covered by Stipulation of the Parties, R. 4, 5).

The petitioner also submitted to the Commission evidence that failure to rezone her property for commercial use, permitting her to take advantage of a pending offer for a long-term commercial lease, would create a severe and irreparable financial hardship in that on January 1, 1965, during her 78th year, a pension providing one of her major sources of income will terminate. The income from such a commercial lease is the only foreseeable source of income to replace that pension, and her inability to obtain such income by virtue of the restriction of her property to residential use would require petitioner at her advanced age to reorganize and radically change the standard of living enjoyed by her throughout her adult life (R. 81, 82). There was also evidence before the Commission that a long-term commercial lease was the only feasible solution to this income gap, since the petitioner lacks capital to develop the land for residential use and her low income tax basis would preclude a sale of the property (R. 43, 45, 47). The prospective lessors were not interested in the property if it remained zoned for residential purposes (R. 47).

The owners of the property situated between petitioner's Tracts (1) and (3) on the west side of Watts Street joined petitioner in her application for a zoning change on October 18, 1960 (R. 75). The owners of property immedi-

ately to the south and southwest of petitioner's property certified to the Planning and Zoning Commission on that date that they had no objection to the zoning change requested by her (R. 83).

After considering the foregoing, the Planning and Zoning Commission again denied petitioner's request as reflected by its minutes for the meeting of October 18, wherein it is stated: "The Commission found no reason or reasons to change or amend its recommendations reported to the City Council on July 25, 1960" (R. 88).

The Commission's report came before the City Council on November 7, 1960 (R. 91).

On this occasion, the City Planning Director "advised that he feels there is already sufficient commercial zoning in this area, and that it is in the best interest of the public not to add to the commercial zoning in this area. He said that in order to maintain sound planning this request for change of zone should not be granted" (R. 92).

A motion to approve the report of the Planning and Zoning Commission resulted in a tie vote and failed to pass, and a motion to approve the petitioner's request for a zone change and to authorize a public hearing was passed by a vote of 7-to-5 (R. 92, 95).

The public hearing was set for November 21, 1960 (R. 94).

At the public hearing the petitioner placed before the Council additional photographic evidence of the commercial character of the area in which her property is located (Exs. 28 through 38, R. 35, 36), and submitted an affidavit from an additional property owner in the area who stated that she had no objection to the rezoning of petitioner's property, and who further stated, "I think it would improve my property" (R. 88).

The only party appearing before the City Council in opposition to the petitioner's request was a representative of the Rand interests, who own the Northgate Shopping Center, Inc., operator of the shopping center directly to the east of petitioner's property (R. 40, 95, 96).

The record in the case before the Council at this point included evidence that the Rand family was opposed to the commercial use of petitioner's land because they had made a heavy financial investment in the shopping center and feared economic competition (R. 79, 80; R. 95, 96).

The Rands' representative told the Council that "the Rands have put a large sum of money into this project * * *," and that he did not think "it would be wise for the Council to come in at this time and zone additional property for shopping center purposes * * *. (The) Council should wait and see what the growth in this area will be, before rezoning additional property for shopping centers" (R. 96).

When the Northland Investment Company, owned by the Rand interests, sought in 1957 the enactment of an amendment to the City Zoning Ordinance changing the zoning of the property on the east of Watts Street north of Club Boulevard from Zone R-8, Residential, to Zone C-1A, Shopping Center, some 200 residents of the area opposed the change and certain of them, residing south of Club Boulevard, unsuccessfully sought to enjoin the change and construction of the shopping center (R. 45, 46; see also *Penny* v. *Durham*, 249 N. C. 596, 107 S. E. 2d 62 (1959); and R. 40). The petitioner's property is completely isolated from that of the complainants in the *Penny* case, both by the shopping center and by the other commercial structures on Club Boulevard as described above (R. 47; Ex. 4-I, R. 32).

No residential property owner appeared before the City Council at the public hearing November 21, or before any prior hearing of the City Council or the Planning and

Zoning Commission, to protest the zoning change requested by the petitioner (Pet., par. 6, R. 13, admitted in Answer, par. 6, R. 26).

The only comments from the City Planning Director and from the City Manager at the public hearing were reflected in the minutes as follows:

> "The Planning Director was asked some questions about how he thought the Commission would feel about changing the zone of only one tract, and he replied that the Commission's recommendation was that this area not be changed at this time, as the need for more commercial zone in this area had not been shown.
>
> "Mr. Aull, City Manager, was asked how he felt about the matter, as a member of the Planning and Zoning Commission. He stated that he felt that there is no need for the furtherance of the commercial zone in this area, at this time." (R. 98)

After rejecting by a vote of 8-to-5 the motion of Alderman Jones to rezone the Markham property east of Buchanan Boulevard to C-1A, the Council by a vote of 10-to-3 voted to approve the recommendation of the Planning and Zoning Commission (R. 97, 98). Alderman Baynes and Alderman Barbour, who had voted for the petitioner on November 7, voted against the petitioner on November 21, on the motion of Alderman Jones (R. 92, 98).

How Federal Questions Were Raised

Petitioner thereafter filed in the Superior Court of Durham County a petition for a writ of *certiorari* (R. 8-22) alleging that the action of the City Council on November 21 was arbitrary, capricious, unreasonable and confiscatory, and therefore was unconstitutional and invalid as a matter of law (R. 18); that the Council's action violated the 14th Amendment to the United States Constitution in that its action was discriminatory and a denial of the equal

protection of the laws of North Carolina (R. 19); and that the Council had granted an exclusive privilege to neighboring landowners likewise in violation of the 14th Amendment (R. 21). Constitutional issues, in fact, were first raised by the petitioner in her motion for rehearing before the City Planning and Zoning Commission August 1, 1960 (R. 50, 51).

The writ was issued November 29, 1960, by Judge Heman R. Clark. The respondents moved to dismiss this writ on December 8, 1960. On October 20, 1961, Judge Clark denied the motion to dismiss; to which respondent excepted and appealed. On November 8, 1962, respondent answered the petition and the case came on before Judge Henry A. McKinnon, Jr., who dismissed the writ and affirmed the constitutional validity of the action of the City Council (R. 138-140). From that judgment petitioner excepted and appealed to the Supreme Court of North Carolina, assigning as error the Superior Court's conclusion that the action of the City Council was not clearly shown to have contravened the United States Constitution (R. 140-142).

The Opinion of the North Carolina Supreme Court Below

While acknowledging that "the real controversy would seem to be whether the zoning ordinance now in effect is invalid as to petitioner's property" (Appendix B, *infra*, p. 15a), the Supreme Court of North Carolina declined to determine this issue. Instead it posited its judgment on the grounds that the petitioner had chosen an inappropriate remedy for challenging the validity of the ordinance, and held, therefore, that the lower court had no jurisdiction to consider the merits of the case. In holding that the writ of *certiorari* is not available to test the action of a municipal *legislative* body, the Supreme Court of North Carolina ignored authorities clearly suggesting that

in matters such as that involved here, the City Council of Durham was acting in a *quasi-judicial* capacity. Actions of a quasi-judicial nature, as the Supreme Court stated in its opinion (Appendix B, *infra*, p. 9a), are indeed reviewable by the courts under writ of *certiorari*. Moreover, the Supreme Court of North Carolina evaded the constitutional issues involved by ignoring altogether its own decisions of 70 to 100 years' standing, including some to the effect that where, as here, a lower court has denied respondents' motion to dismiss a writ of *certiorari*, no appeal from such a judgment lies to the State Supreme Court. Under the North Carolina practice prior to this case, therefore, the respondent city could not even have been heard to challenge the petitioner's choice of remedies in the Supreme Court, and the court would necessarily have had to decide the constitutional questions presented.

Moreover, the Supreme Court pointed to "appropriate procedures" supposedly "available for a judicial determination" of the validity of the ordinance in question (Appendix B, *infra*, p. 15a), but cited cases which offer petitioner no enlightenment whatever as to the method by which she should proceed. The law of North Carolina is vague as to whether there *is* any other method by which petitioner can proceed anew (save by subjecting herself to the penalties provided by law for violating the zoning ordinance). The petitioner is an aged widow whose major potential source of income after January 1, 1965 is the lease or sale of the property in question; under the ruling of the North Carolina Supreme Court, she must now proceed to test the ordinance which allegedly has deprived her property of its value by one of several other methods. Any one of these methods is subject, in view of the uncertainty of the state law, to further delay through procedural challenges by the respondent city. If petitioner initiates another form of action, there is no certainty she will not face additional years of litigation; meanwhile the property lies useless and the infirmities of age take their toll. Under these circumstances, the refusal of the North

Carolina Supreme Court to decide this case on the merits—and to determine once and for all the constitutionality of the ordinance as it applies to petitioner's property—is in itself a denial of due process of law which contravenes the 14th Amendment to the Constitution.

These points are developed at greater length below.

Reasons for Granting the Writ

1.

The constitutionality of the respondent city's zoning ordinance, as it applies to petitioner's property, was clearly raised at the inception of this case. On the record here, the ordinance violates the Fourteenth Amendment under the rule of *Nectow* v. *Cambridge*, 277 U. S. 183 (1928), involving identical facts.

In *Nectow* v. *Cambridge*, plaintiff's land, like that of petitioner's, was placed in a zone restricted to dwellings, clubs, churches, schools and the like. The lands to the north and west were within a restricted residential district; those to the south and east were used for commercial purposes, as here. Plaintiff there had the opportunity to dispose of an interest in his land, but, because of the zoning ordinance, was unable to do so; the instant petitioner's situation is same. The record there showed "no practical use can be made of the land in question for residential purposes because * * * there would not be adequate return on the amount of any investment for the development of the 'property'"; the record here, through the statements of seven experienced realtors, is the same. The record in *Nectow* v. *Cambridge* also showed, as does this record, that the districting of plaintiff's land in a residential district "would not promote the health, safety, convenience and general welfare of the inhabitants of that part of the defendant city, taking into account the natural

development thereof and the character of the district * * *."

Mr. Justice Sutherland, speaking for a unanimous Court, and holding that the ordinance in question was invalid, said (at 277 U. S. 187, 188):

> "It is made pretty clear that because of the industrial and railroad purposes to which the immediately adjourning lands to the south and east have been devoted and for which they are zoned, the locus is of comparatively little value for the limited uses permitted by the ordinance * * *. The governmental power to interfere by zoning regulations with the general right of the landowner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare. *That the invasion of the property of plaintiff * * * was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained.*" (Emphasis added).

On facts substantially identical to those here, the highest courts of numerous states have held municipal zoning ordinances unconstitutional as being arbitrary, unreasonable and confiscatory. See *Rowlands* v. *Racine*, 271 N. W. 36, 128 A. L. R. 741 (Wis., 1937); *Tingley* v. *Gurda*, 243 N. W. 317, 128 A. L. R. 741 (Wis., 1932); *Texas* v. *Woolhizer*, 185 N. E. 827, 128 A. L. R. 742 (Ill., 1933); *Galt* v. *Cook County*, 91 N. E. 2nd 395 (Ill., 1950); *Little Rock* v. *Joyner*, 206 S. W. 2nd 446 (Ark., 1947); *Miami Beach* v. *First Trust Co.*, 45 So. 2nd 681 (Fla., 1949); *Corthouts* v. *Newington*, 99 A. 2nd 112, 38 A. L. R. 2nd 1136 (Conn., 1953); *Arverne Bay Construction Co.* v. *Thatcher*, 278 N. Y. 222 (1938); *Sundlun* v. *Zoning Board of Review*, 145 A. 451, 86 A. L. R. 671, 672 (R. I., 1929).

The arbitrary, capricious and unconstitutional action of the municipal body here is clearly established, moreover, by the fact that there was no evidence in the record before it to overcome the overwhelming weight of petitioner's evidence that the restriction of her land to residential purposes has destroyed its value. The record is totally devoid of evidence reasonably relating the continued residential zoning of the property to the public health, welfare, safety or morals. The zoning authority (in North Carolina, the City Council) apparently based its action in part upon the vague and irrelevant opinions of the City Planning Director, unsupported by any evidence, that no additional commercial property was needed in the area (R. 40, 41, 92, 98), and that a rezoning would be contrary to an undocumented "sound [development] plan" for the city (R. 40, 41, 92); and in part upon the persuasiveness of an adjacent shopping center owner (the *only* neighbor who appeared in opposition to the petitioner's request) who, the record shows, feared economic competition if petitioner's land were devoted to commercial use (R. 79, 80, 95, 96). Zoning restrictions to be valid must be reasonable, necessary, and reasonably related to the health, safety, morals or general welfare of the community. See 58 Am. Jur., Zoning Sections 18, 26, and numerous cases cited therein. Where there is an arbitrary exercise of the police power, there must be a reasonable explanation for it. *Dobbins* v. *Los Angeles*, 195 U. S. 223, 239 (1904). No such explanation appears here.

2.

Three years before the petitioner requested a rezoning of her property for commercial use, the zoning authority had granted to the owners of the shopping center site a similar change from a residential to a commercial zone, over the protest of some 200 neighboring landowners (R. 45, 46; *Penny* v. *Durham*, 249 N. C. 596, 107 S. E. 2nd 62

(1959)). The effect of the action in the petitioner's case, on the specious grounds set forth immediately above, is to grant to the shopping center a monopoly on all new commercial construction in the area in violation of the equal protection clause of the Fourteenth Amendment.

As this Court said in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558 (1901):

> "The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

3.

Petitioner requested that her property be reclassified from its *residential zone* in order to lease her land for the construction and operation of a bowling alley (R. 74, 79, 82, 91, 96). While her request was pending, the municipal authorities amended the zoning ordinance relating to *shopping center zones* to permit construction and operation of bowling alleys in such zones (R. 67-71). The property directly across the street is included in a shopping center zone. Although there is no evidence that the owners of the adjacent shopping center have negotiated a lease with petitioner's prospective tenant, there has been no legal or practical obstacle to their doing so, or to their operating a bowling alley directly across the street from petitioner's property, since September 19, 1960. Meanwhile, the petitioner has lost thousands of dollars in rents (R. 81) through the respondent city's refusal to accord her the same privilege it almost simultaneously granted her neighbors, among others. The City Council's action in this respect is likewise a violation of the equal protection clause of the Fourteenth Amendment. *Connolly* v. *Union Sewer*

Pipe Co., as quoted *supra*. A municipality is not permitted, under the guise of regulating business and segregating it to a particular district, to grant a monopoly to business enterprises already situated in unrestricted districts. *Pacific Palisades Ass'n* v. *Huntington Beach*, 237 P. 538, 40 A. L. R. 782 (Cal., 1925).

The City Council of Durham and the City Planning Director apparently propose, under the rulings evidenced in this case, that no one but the Northgate Shopping Center can engage in any new business enterprise within a broad and fast-developing area of the city. This policy of granting exclusive privileges has no foundation whatever in law or in public morality, and we respectfully ask this Court to strike it down.

The Superior Court of Durham County ruled that the "clear invalidity" of the City Council's actions as set forth above had not been shown, and the petitioner appealed that decision on the merits to the Supreme Court of North Carolina. The respondent city, having previously challenged the jurisdiction of the lower court on the ground that review of the action of a municipal governing body was not available by writ of *certiorari*, appealed the lower court's order denying its motion to dismiss that writ, and also appealed so much of the lower court's subsequent judgment as implied that it had jurisdiction to determine the merits.

The Supreme Court of North Carolina in the judgment for which petitioner seeks review here, ignored the alleged violations of the United States Constitution and ruled, citing what is purportedly the law of North Carolina, that the lower court had no "jurisdiction" to pass on the constitutional questions (Appendix B, *infra*, p. 14a).

4.

Petitioner is fully aware of the general rule, too well established to require citation, that the Supreme Court of the United States will not review a judgment of a state court, even where a federal or constitutional question may be involved, if that judgment is based upon adequate grounds of state law.

This rule is not absolute. This Court has held in numerous cases that a state court may not evade the determination of federal constitutional issues and deprive the United States Supreme Court of jurisdiction to review such a determination, by grounding its judgment upon technicalities of state procedure:

"Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923). "The law of the United States cannot be evaded by the forms of local practice." *American Railway Express Co.* v. *Levee*, 263 U. S. 19, 21 (1923). "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that a fair result of a decision is to deny the rights." *Rogers* v. *Alabama*, 192 U. S. 226, 230 (1904). "It is established law that this Court is not finally concluded by the state court's determination as to the sufficiency of pleadings asserting a federal right." *Ellis* v. *Dixon*, 349 U. S. 458, 463 (1955). See also *Ward* v. *Love County*, 253 U. S. 17, 22 (1920) and *Staub* v. *City of Baxley*, 355 U. S. 313, 319 (1958), and cases cited therein.

"Jurisdictional" grounds cited by the Supreme Court of North Carolina to thwart determination of a federal claim are not unfamiliar to this Court. The language of

Mr. Justice Frankfurter in *Angel* v. *Bullington*, 330 U. S. 183, 188-189 (1947) is equally applicable here:

> "Here, claims based on the United States Constitution were plainly and reasonably made in the North Carolina suit. The North Carolina Supreme Court met these claims. It met them by saying that the North Carolina statute did not deal with substantive matters, but merely with matters regulating local procedure. But whether the claims are based on a federal right or are merely of local concern is itself a federal question on which this Court, and not the Supreme Court of North Carolina, has the last say. *That Court could not put a federal claim aside, as though it were not in litigation, by the talismanic word 'jurisdiction.'* When an asserted federal right is denied, the sufficiency of the ground for denial is for this Court to decide." (Emphasis added.)

In *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 457 (1958), this Court held that a state may not resort to novel procedural requirements in order to "thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." In that case, the petitioner, as here, sought to obtain court review of state action by way of *certiorari*, in reliance upon the existing law (see below, pp. 25-30, 33-35). The Supreme Court of Alabama ruled in that case that *mandamus* was the proper remedy; but this Court decided that it nevertheless had jurisdiction to entertain the petitioners' federal claims.

In view of the foregoing decisions, this Court may properly take jurisdiction of the case and determine the constitutional questions raised in Points 1 through 3 above.

5.

In entertaining the respondent city's appeal to it from the lower court's order upholding *certiorari* as a proper remedy in this case (Appendix B, *infra*, p. 2a; R. 142)—not to mention, in ruling *in respondent's behalf* on that appeal—the Supreme Court of North Carolina ignored two of its own decisions, unchallenged for more than 70 years, holding that an order of a lower court, denying a motion to dismiss a writ of *certiorari*, is not appealable. In entertaining an appeal by the respondent city on the procedural question from the subsequent lower court judgment in its favor on the merits (Appendix B, *infra*, p. 3a; R. 142), the Supreme Court ignored a decision of more than 100 years' standing that a party may not appeal from a judgment in its own favor. If the law as set forth in these decisions had been observed here, the procedural issue would not even have been considered in the Supreme Court of North Carolina. A state court may not overrule or ignore its prior decisions where its action deprives a litigant of due process. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673 (1930); *N. A. A. C. P.* v. *Alabama*, *supra*; cf. *Williams* v. *Georgia*, 349 U. S. 375 (1955). (For discussion of deprivation of due process here, see below pp. 24-36.)

In *Hillsboro* v. *Smith*, 110 N. C. 417, 14 S. E. 972 (1891), the Commissioners of the Town of Hillsboro objected to the action of the Board of Commissioners of Orange County in granting one Smith a license to sell intoxicating liquors, and moved for court review of the Board's action by *certiorari*. The defendant Smith, as did the respondents here moved to dismiss the motion on the ground that the proceedings of the Commissioners of Orange County were not subject to such review, as their action in granting the license was in exercise of the discretion vested in the Board. The Superior Court Judge refused to dismiss the motion for writ of *certiorari* and ordered the proceedings of the Board certified, as did Judge Clark below. The defendant

Smith appealed to the Supreme Court of North Carolina. The Supreme Court said:

> "As no appeal lies from that body [the Board of Commissioners of Orange County] in a case like this, the writ of certiorari was properly granted. *We are also of the opinion that the order of the judge is not appealable and that the appeal must be dismissed. Bank* v. *Burns*, 107 N. C. 465." (Emphasis added.)

In *Farmers' National Bank* v. *Burns*, 107 N. C. 465, 467, 12 S. E. 252 (1890), the Supreme Court said:

> "The plaintiffs appealed from the order of the Court granting the writ of *certiorari* to be directed to the Clerk, commanding him to send to the Judge a transcript of the record of the proceedings, etc. The Court did not examine the decision of the Clerk complained of; that matter was not before it. The purpose of its order was to enable it to review the decision of the Clerk, and correct the error, if any should appear. *The order appealed from was not in any sense interlocutory—it was merely incidental in the course of the action, and no appeal lay from it, at once or at all.* The supposed appeal must, therefore, be dismissed." (Emphasis added.)

A writ of *certiorari* issues in the sound discretion of the court. *King* v. *Taylor*, 188 N. C. 450, 451, 124 S. E. 751 (1924); *Womble* v. *Moncure Mill & Gin Co.*, 194 N. C. 577, 579, 140 S. E. 217 (1927). A judgment or order rendered by a judge of the Superior Court in the exercise of a discretionary power is not subject to review by appeal to the

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[2] The case of *Beal's Department Store* v. *Guilford County*, 222 N. C. 441, 23 S. E. 2d 897 (1943), would not have authorized the hearing of respondents' appeal on this issue. There the Supreme Court reversed the order of the lower court denying a motion to dismiss a petition for *certiorari*, but the Court made it clear that its decision turned upon the fact that the petition was addressed to the question of the valuation of property—a fact question—and not to errors of law. The petition in this case raised questions of law, namely, whether the Council's action was unconstitutional.

Supreme Court in any event, unless there has been an abuse of discretion. *Veazey* v. *Durham*, 231 N. C. 357, 360, 57 S. E. 2d 377, 382 (1950). No abuse of discretion was alleged or shown by respondent here.

Moreover, if the respondents had appealed immediately from Judge Clark's order, the appeal would undoubtedly have been dismissed on the well-settled ground that no appeal lies from the refusal of a motion to dismiss an action. *Bradshaw* v. *Bank*, 172 N. C. 632, 90 S. E. 789 (1916); *Goldsboro* v. *Holmes*, 183 N. C. 203, 111 S. E. 1 (1922). "The reason no appeal lies from a refusal to dismiss is that it does not come within the purview of the statute * * * permitting appeals." *Johnson* v. *Insurance Co.*, 215 N. C. 120, 122, 1 S. E. 2d 381 (1939).

On the other hand, if the respondent is regarded as having appealed from so much of Judge McKinnon's judgment as suggested a writ of *certiorari* was proper (Appendix B, *infra*, p. 3a; R. 142), it had no standing under North Carolina law to appeal because a party has no right to appeal or bring error from a judgment in his own favor. *Hoke* v. *Carter*, 34 N. C. 327 (1851).

Since the respondent city won a decision on the *merits* in the Superior Court of Durham County, there are no plausible reasons why the *procedural* issue was even pressed by respondent in the Supreme Court of North Carolina other than (1) to thwart a possible reversal by the Supreme Court of a clearly erroneous judgment on the constitutional issue; and (2) to secure a decision limiting the methods by which citizens may test in the courts arbitrary and capricious interferences with their property rights by municipal governing bodies. Both these purposes appear to have been well served here.

The failure of the Supreme Court of North Carolina to observe its own ancient precedents deprives its judgment of the insulation of the "adequate state ground" rule. *N.A.A.C.P.* v. *Alabama*, *supra*; *Williams* v. *Georgia*, *supra*.

6 and 7.

Finally, the ruling of the Supreme Court of North Carolina in the instant case represents an unconstitutional denial of due process in itself, cf. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, *supra*, in that it deprives petitioner of any effective and practical means of testing the alleged violations of her constitutional rights.

Having chosen the method of litigation to secure her constitutional rights which reasonably appeared most appropriate *under North Carolina law* at the inception of these proceedings, petitioner must now—three years later—resort to another remedy. Yet the state of the law in North Carolina is so vague that there is no guarantee even now that the procedural method she chooses will go unchallenged by the respondent as inappropriate. There is, moreover, no guarantee that respondent would not again be successful in its challenge.

Let us review briefly the posture of the matter in and after June, 1960. Petitioner then had an opportunity to lease her residentially-zoned property, but only on condition that the proposed commercial use of the tract conform to the municipal zoning regulations. The procedure prescribed by law for obtaining an amendment to the zoning ordinance was and is, the filing of a request for such an amendment with the City Planning and Zoning Commission, which has authority only to make recommendations with respect thereto to the City Council. (See Appendix B, *infra*; p. 13a.) Only the City Council is empowered under North Carolina law to amend the zoning law; the statutory Board of Adjustment has the power merely to grant variances therefrom. *Lee* v. *Board of Adjustment*, 226 N. C. 107, 137 S. E. 2d 128, 168 A. L. R. 1. The petitioner followed the procedure which the law required, and some five months later, the matter was finally resolved adversely by the City Council's decision of November 21, 1960.

Since the existing ordinance appeared unconstitutional under the rule of *Nectow v. Cambridge* and otherwise, petitioner had the option (1) of seeking immediate judicial review of the ordinance and of the Council's summary action, based on the record before it; or (2) of launching an entirely new proceeding to test the validity of the ordinance. What did the law of North Carolina then reveal to guide petitioner in this choice?

Under the then effective statutes and judicial decisions of North Carolina, and the decisions in other jurisdictions,[3] the filing of a petition for writ of *certiorari* in the Superior Court reasonably appeared to be the proper method (if not the only method other than violating the zoning ordinance and risking a fine or other penalties) for securing a judicial determination of petitioner's rights. In fact, in *Brooks v. Morgan*, 27 N. C. 481, 486 (1845), Chief Justice Ruffin set forth the rationale for use of the writ in North Carolina as a *direct* method of appeal:

> "It could never be intended by the legislature that summary adjudications * * * should, however, erroneous in point of law, conclude the citizen; and

[3] As noted in McQuillin, Municipal Corporations, 3d Ed., Vol. 6, Sections 20.35, 20.36, pp. 90, 92, *certiorari* has been held available to test the validity of municipal ordinances: ordinance vacating a street or alley, *Lerch v. Short*, 185 N. W. 129 (Iowa, 1921); ordinance extending a street by means of condemnation, *Rockwell v. Boxers*, 55 N. W. 1 (Iowa, 1893); ordinance providing for a bond issue, *Sherman v. Long Beach*, 153 A. 109 (N. J., 1931); ordinance restricting outdoor advertising signs in a borough and in effect prohibiting plaintiff from continuing in business, *O'Meara Outdoor Adv. Co. v. Rutherford*, 27 A. 2d 863 (N. J., 1942). See also *Grandview v. McElroy*, 9 S. W. 2d 829 (Mo., 1928), involving an ordinance severing a territory from a municipal corporation, and *Alden Corp. v. Flynn*, 49 A. 2d 369 (R. I., 1946), involving the town council's refusal to grant a license for a filling station. "Certiorari has been held to be an appropriate remedy to test the validity of a zoning ordinance." *McQuillan*, id. at p. 94. (Cases cited by McQuillin in support of this proposition, however, are cited at Vol. 8, Sec. 25.286, footnote 11.)

> although the party affected by them may, perhaps, insist that they are void and resist them *in pais*, or sue those who act under them, *it is much better to allow him at once and directly to submit them to revision and reversal, if found to be against the law* • • • therefore, from necessity, we must retain this use of the certiorari." (Emphasis added).

In another early case, *Matthews* v. *Matthews*, 26 N. C. 155, 158 (1843), the Supreme Court said:

> "[In] a summary proceeding of an inferior tribunal, not according to the common law, we think the party entitled, *ex debito justitiae*, to a *certiorari* to bring it up for review in the matter of law, as in other cases on a writ of error; and if found to be erroneous, to have it quashed."

Section 1-269 of the North Carolina General Statutes incorporates these principles in providing that "writs of certiorari are authorized as heretofore in use." Where a statute authorizing a proceeding makes no provision for a review, *certiorari* may be maintained for that purpose. *Hillsboro* v. *Smith*, *supra*; *Hunsucker* v. *Winborne*, 223 N. C. 650, 27 S. E. 2d 817 (1943); *Warren* v. *Maxwell*, 223 N. C. 604, 27 S. E. 2d 72 (1943); *Pue* v. *Hood*, 222 N. C. 310, 22 S. E. 2d 896 (1942). Since no appeal from the action of a City Council in amending or refusing to amend a zoning ordinance is provided by G. S. 160-172-181.1, or by the Zoning Ordinance of the City of Durham, *certiorari* on its face was appropriate here unless excluded by some other rule of law.

"A writ of certiorari is an extraordinary remedial writ and • • • lies for two purposes: (1) as a writ of false judgment to correct errors of law; and (2) as a substitute for an appeal • • •. Its object is only to bring up the record of an inferior court *or of an officer or commission* acting judicially and to prevent an improper deprivation of appeal • • •. *It issues from a superior to an inferior court, officer or commission acting judicially, and*

it lies only to review judicial or quasi-judicial action." *Pue* v. *Hood*, *supra*, at 22 S. E. 2d 898. (Emphasis added.)

There is ample authority, in North Carolina law and elsewhere, for the conclusion that a municipal legislative body, acting with respect to the zoning of private property, is acting in a *quasi-judicial* capacity so as to render *certiorari* an appropriate vehicle for judicial review of its decisions under the rule of *Pue* v. *Hood*, which was in fact, relied on below (Appendix B, *infra*, p. 9a).

"A municipal corporation may possess legislative, political, executive, or judicial powers. *The legislative body of a city acts in a quasi-judicial capacity when it grants or denies a privilege or benefit and in a legislative capacity when it prescribes a course of conduct.*" 62 C. J. S., Municipal Corporations, Sec. 112. (Emphasis added.)

We think it clear that in this case the Council of the City of Durham was not prescribing a course of conduct. It arbitrarily and capriciously *denied* the petitioner the privilege of having her land zoned according to its most appropriate use. It *granted* to a neighboring landowner a monopoly and exclusive privilege to operate bowling alleys and, indeed, other new business enterprises in that area of the city. The latter action alone seemed sufficient to invoke the Court's jurisdiction under a writ of *certiorari*.

The North Carolina court clearly implied in *Pue* v. *Hood* at 22 S. E. 2d 900, that *certiorari* lies to review arbitrary and capricious actions of a public official or body of public officials:

> "The complaint fails to allege any fact tending to show he did not act in strict accord with the provisions of the statute. Nor does it contain the allegation of any fact which would tend to indicate that he acted capriciously, in bad faith, or in disregard of the provisions of the statute under which he proceeded. Merit is not shown and his action (on allegations made) being in strict accord with the statute, cannot be challenged in the manner here attempted. The administrative features of the law are not to be set at nought by recourse to the Courts

> * * *. *Hence, certiorari will not issue to review his action* * * * *it must not be understood that we here hold an applicant for a charter is in all events remediless. When an officer acts capriciously, or in bad faith, or in disregard of law, and such action affects personal or property rights, the courts will not hesitate to afford prompt and adequate relief.*" (Emphasis added.)

In *Cox* v. *Kinston*, 217 N. C. 391, 9 S. E. 2d 252, 258, the North Carolina Supreme Court likewise implied that a legislative body may *assume* judicial powers when it deals capriciously with individual rights, in its observation, "*The Legislature does not assume the judicial power* in declaring the public policy with regard to conditions which it finds to be detrimental to the public interest, socially, economically, or politically, *so long as it stays within the limits of the constitution and invades no naturally inalienable right.*" (Emphasis added.)[1]

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[1] Still other North Carolina decisions support the view that *certiorari* was a proper procedure to review the actions of local governing bodies. In *Berry* v. *Commissioners of Chatham County*, 130 N. C. 558, 41 S. E. 787 (1902), a State statute authorized the Board of Commissioners to establish a stock law upon petition of a majority of landowners anywhere in the County. The defendant Board refused to take action on a petition signed by Perry and others for what the Supreme Court determined to be invalid reasons. Perry brought an action of mandamus to compel enactment of the stock law. The defendant Board demurred, *inter alia*, on the ground that the plaintiff's remedy was by *certiorari*. Relying upon *Hillsboro* v. *Smith*, *supra*, the North Carolina Supreme Court (at 559-560) *agreed that certiorari was a proper remedy*, saying: "but this is not imperative, like an appeal when one lies, and plaintiffs could, if they so elect, bring this action and ask, as in all similar cases, for mandamus to compel public officers to obey a plain duty prescribed by statute." In *Walls* v. *Strickland*, 174 N. C. 298, 93 S. E. 857, 858, Chief Justice Clark noted in a concurring opinion, "We have held that an appeal lay from the county commissioners. *Young* v. *Rollins*, 91 N. C. 131; *Lambe* v. *Love*, 109 N. C. 305, 13 S. E. 773." In *Dickson* v. *Perkins*, 172 N. C. 359, 90 S. E. 289, 290 (1916) the Supreme Court said: "[T]he Superior Court, in the exercise of its general powers of control and supervision over any and all subordinate tribunals may * * * bring the cause before it for review, assuredly so in the case of manifest and gross abuse."

"All actions affecting the property rights of private persons are clearly judicial and subject to review." 10 Am. Jur., Certiorari, Sec. 10. "A writ of certiorari lies to review the decisions of officers—whatever their public character—who are invested by the legislature with power to decide upon the property rights of others, since such action is of a judicial nature", *ibid.*, footnote 4, citing *Jarman* v. *Board of Review*, 345 Ill. 248, 178 N. E. 91, 77 A. L. R. 1350 (1931). It follows that the City Council of Durham, passing upon a request for an amendment to the zoning ordinance, and having thus been "invested by the legislature with power to decide upon the property rights of others" was acting *judicially*.

The case of *Gates* v. *City Council of Bloomfield*, 50 N. W. 2d 578 (Iowa, 1951), sharply defines this concept. In that case, the City Council by ordinance established an interurban bus stop zone 43 feet long in front of plaintiff's business building. The plaintiff sought to have this ordinance reviewed by *certiorari*, alleging that it was an uncompensated taking of property for "the sole purpose and benefit of the adjourning owner to the south"—a bus station with 12 feet of frontage. (We need not dwell upon the similarity there to the benefits derived solely by the Northgate Shopping Center from the City Council's action here.) *The defendant City* (as here) *claimed that the plaintiff was not entitled to certiorari because the Council had acted in a legislative capacity, and the statute authorizing the writ limited it to review of action by an inferior tribunal, board or officer "exercising judicial functions."* The Court ruled that *certiorari* was a proper remedy, saying (at 583):

> "Plaintiff's entire case is that the ordinance was a grant of the use of the street to the bus companies to carry on their business. We hold it was such a grant and as such the action of the City Council was judicial. 62 C. J. S., Municipal Corporations, Sec. 112. *The nature of the act performed determines whether or not it was legislative or judicial.*

The Council undertook to determine law when it decided it had the power to grant to the bus companies the privilege of using the city streets to carry on their private businesses. The fact that the grant took the form of an ordinance excluding all, or almost all, from the bus zone area except the buses is of no importance." (Emphasis added).

Following the analogy of the *Gates* case, it appears that the City Council of Durham—which has vast powers over individual property rights under the North Carolina statutory scheme for zoning—undertook to determine law when it decided that it had the power, for no demonstrable reason, to deprive petitioner of the most appropriate use of her property; and to grant to her neighbor, in effect, exclusive privileges to operate new commercial enterprises in a certain area. This was not a legislative act, and "the fact that the grant took the form of an ordinance * * * is of no importance."

There is obviously a basic difference between an act of a municipal governing body which adversely affects the existing property rights of *one* citizen, as in this case, and a general ordinance regulating the conduct of *all* citizens, as would be the enactment of ordinances imposing a speed limit in a residential zone, authorizing a stop sign at a busy intersection, or forbidding the use of firecrackers within the city limits. No one suggests these to be kind of municipal ordinances which should be reviewable by *certiorari*. (The Iowa Court made another perceptive distinction on this point in *Ishe* v. *Newton*, 7 N. W. 13 (1880).)

The foregoing affords a reasonable basis for petitioner's decision in November, 1960 to proceed to test the validity of the City Council's action and of the ordinance in question by *certiorari*. Petitioner had the right to rely on these authorities and she may not now be deprived of a hearing on her constitutional rights by the North Carolina Supreme Court's refusal to adhere to or even discuss them.

N.A.A.C.P. v. *Alabama*, *supra*; *Staub* v. *City of Baxley*, *supra*, at 320; *Williams* v. *Georgia*, *supra*.

In the light of the authorities cited, the judgment of the North Carolina Supreme Court cannot bar the jurisdiction of this Court to determine the constitutional question. It was "without any fair or substantial support",[5] in that the court relied solely upon "hornbook law" assertions, which petitioner does not challenge, that *certiorari* "does not lie to review the action of an inferior tribunal or board in the exercise of purely legislative functions" (Appendix B, *infra*, p. 9a); the "legislative body of the City of Durham is its City Council" (Appendix B, *infra*, p. 10a); and "in enacting a zoning ordinance a municipality is engaged in legislating" (Appendix B, *infra*, p. 10a), etc. The law books are full of such platitudes, and the North Carolina court sprinkled them liberally, if not indiscriminately, throughout its opinion with no apparent regard for the undisputed facts of the case, for the distinctions petitioner sought to draw, for authorities such as petitioner has cited above,[6] or even for the relief which petitioner had asked.

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[5] See *Ward* v. *Love County*, 253 U. S. 17, 22 (1920).

[6] Thus the North Carolina court (Appendix B, *infra*, pp. 9a-11a):

(a) cites 10 Am. Jur., Certiorari, Sec. 10, for the undisputed proposition that *certiorari* does not lie to review legislative action, but ignores the rule set forth in the same section that all actions affecting private property rights are judicial and are subject to review;

(b) cites *Pue* v. *Hood*, *supra*, for the undisputed proposition that *certiorari* issues only to review judicial or quasi-judicial action, but ignores its own language therein that the courts will not hesitate to afford "prompt and adequate relief" from capricious and illegal action by public officials affecting property rights;

(c) cites numerous cases to the effect that municipal ordinances are enacted in the exercise of a legislative function, but ignores the dual capacity of municipal "legislative bodies" as is made clear at 62 C. J. S. Municipal Corporations, Sec. 112, cited above (p. 27);

(d) cites still other decisions to the effect that the courts may not restrain the passage of a municipal ordinance, an issue which is totally irrelevant here.

The North Carolina court's reliance upon numerous cases, largely from other jurisdictions, to the effect that the courts may not compel zoning ordinances to be "repealed, enacted, or amended" (Appendix B, *infra*, pp. 11a, 12a) reveals its total misconception of the relief sought. *Petitioner did not ask the lower court to require the Council to enact, amend or repeal an ordinance; the prayer of her petition* (R. 22) *was simply that "the action of the Council may be reviewed in the Superior Court."*

From a judicial review of the record, of the Council's action, *and* thus necessarily of the underlying ordinance—all clearly within the broad framework of her prayer for relief—petitioner anticipated that the court would either uphold or deny the constitutionality of the zoning ordinance as it applied to her. From a decision that the residential zoning of her property was unconstitutional and the ordinance was thus void as to her, as in *Nectow* v. *Cambridge*, either of two results would have flowed: There would thenceforth have been no restriction on the use of petitioner's property; or the municipal body, in an appropriate manner, would have proceeded to zone it for some other, non-residential use. In either event, petitioner would have been free to negotiate the proposed lease, her tenants would have been free to construct their bowling alley,[7] and the matter would have ended there.

If the North Carolina court, amid all its lengthy asseverations about the powers of the judiciary, intended to suggest that the courts lack the authority to declare a municipal ordinance void on constitutional grounds, which in essence was what petitioner sought, it has stumbled upon the remains of a concept buried in American jurisprudence, at least since *Marbury* v. *Madison*, 5 U. S. 137 (1803).

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[7] Under the municipal zoning ordinance (Ex. 45, R. 30), bowling alleys are permitted in all zones except residential and institutional zones. See Ex. 45, pp. 41, 43-A, 44, 47, 49, 51, 54. The property here involved might be more valuable for institutional purposes than for residential use, but even an institutional zone would appear to be invalid under the authorities cited at pp. 14-15, *supra*.

Moreover, the court's opinion below compounded the confusion already existing in North Carolina law as to the proper method, other than the one petitioner chose, for obtaining judicial review of the zoning ordinance as it applies to her. It was this very confusion that, coupled with the authorities cited above, impelled petitioner to seek review of the ordinance by *certiorari* in the first instance.

It is clear from the Court's opinion below (Appendix B, *infra*, p. 11a) that neither a *mandamus* nor mandatory injunction will lie to compel the City to enact, amend or repeal an ordinance relating to zoning. Moreover, it would be as fruitless now as it was in 1950 for petitioner, or her prospective tenant (if, after all this time, he is still interested) to apply to the City Building Inspector for a building permit and, upon denial, seek *mandamus* or a mandatory injunction to compel the issuance thereof. Neither the Building Inspector nor the Board of Adjustment (which grants variances and hears appeals from that official's determinations) have the authority under *Lee v. Board of Adjustment, supra*, to authorize construction or operation of a commercial enterprise in a residential zone, and surely they could not be compelled to perform an act beyond their legal capacity. The writ of *mandamus* and a mandatory injunction under North Carolina law have an identical function, "to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established." *St. George v. Hanson*, 239 N. C. 259, 263, 78 S. E. 2d 885 (1954). The writ of *mandamus* lies to compel the performance of an *existing legal duty*. *Hospital v. Wilmington*, 235 N. C. 597, 600, 70 S. E. 2d 833 (1952). If the judiciary, as the Supreme Court suggests, is utterly powerless to compel a city council to amend an ordinance, *a fortiori*, it may not order an administrative body or officer to invade the council's province and amend the ordinance in its stead.

A declaratory judgment suit brought under the North Carolina statute, G. S. 1-253 to 1-267, might well be met at the threshold by another claim from the respondent city that the procedure was improper, on some ground such as the absence of an "actual existing controversy between parties having adverse interests," which is required under the North Carolina statute. *Greensboro* v. *Wall*, 247 N. C. 516, 101 S. E. 2d 413 (1958). We have discovered no North Carolina precedent for the use of a declaratory judgment in a suit of this kind.

In the concluding paragraph of its opinion (Appendix B, *infra*, p. 15a), the North Carolina Supreme Court volunteered citations of several cases which, in its view, suggest "appropriate procedures" to test the ordinance. None of these appear to be of any assistance to petitioner whatever.

The official report in *Helms* v. *Charlotte*, 255 N. C. 647, 122 S. E. 2d 817 (1961), decided subsequently to the filing of the original papers in this case, does not even describe the precise nature of the plaintiff's action.

The remaining cases cited by the court arose in the form of actions by private citizens to restrain the enforcement of zoning ordinances, or by the municipality to restrain a violation. In not one of the suits by private citizens was the procedural issue raised. Yet if petitioner should now seek an injunction to restrain the enforcement of the instant ordinance, there would be nothing to prevent the respondent from leading her back down the tortuous procedural route to the North Carolina Supreme Court by insisting upon application of the rule of *Turner* v. *New Bern*, 187 N. C. 541, 547; 549, 122 S. E. 469 (1924). In that case, involving an action to restrain enforcement of an ordinance forbidding erection of a lumber yard in a residential district, the Supreme Court said:

> "We have several times held that no injunction or equitable proceeding will lie against a municipal

> ordinance. Remedy is never given in equity when it can be obtained at law * * * [This] proposition * * * has always been asserted and never denied by any decision in this State."[8]

As indicated at 187 N. C. 548, the "remedy at law" referred to is to violate the zoning ordinance and make a defense at trial. In *Jarrell* v. *Snow*, 225 N. C. 430, 433, 35 S. E. 2d 273, the Supreme Court said, "The constitutionality of an Act or ordinance will not be determined in a suit to enjoin its enforcement".

In short, there is no method by which petitioner can ever be sure of getting a clear-cut judicial determination of her rights, except by constructing the proposed bowling alley or other commercial building on her property and challenging the City to cite her to court, through an injunction or criminal action, for violating the ordinance. This is not merely impractical for the reasons that petitioner has no capital for this purpose (R. 43, 45, 47) and would have great difficulty persuading any reputable building contractor to proceed without a permit: It is simply unconscionable to demand that a woman of such advanced years violate the existing law in order to test the elementary constitutional right to use her property as she sees fit. If a citizen is not required to apply for a permit under a municipal ordinance in order to test its constitutionality, *Staub* v. *City of Baxley*, *supra*, at 319, *a fortiori*, she should not be required to assume the incalculable financial, physical and mental burdens of violating it, in order to achieve the same end.

Therefore, the decision of the North Carolina Supreme Court, which proscribed the remedy which petitioner reasonably chose as most appropriate, and which now requires her either to violate the law or to risk further delay and

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[8] *Turner* v. *New Bern* has never been over-ruled and has repeatedly been cited by the North Carolina Supreme Court as authority for the rule set forth.

litigation as to procedure, itself is a deprivation of due process and contravenes the United States Constitution.[9]

> "While [this Court] has deferred to state substantive grounds so long as they are not patently evasive of or discriminatory against federal rights, it has sometimes refused to defer to state procedural grounds only because they made burdensome the vindication of federal rights." *Fay* v. *Noia* — U. S. —, 9 L. Ed. 837, 865 (1963).

The instant case is one in which state procedure will make extremely burdensome, if not intolerably so, the vindication of petitioner's federal rights.

This Court has rarely been presented with a case in which the property of a private citizen has been expropriated more arbitrarily and recklessly, or with such arrogant indifference to a citizen's reasonable requests and needs. The City Council of the City of Durham, notwithstanding the uncontradicted evidence that its zoning ordinance has rendered petitioner's property valueless, declined to afford her relief on no more substantial a basis than that the City Planning Director—for reasons as yet known only to himself—believed that no more commercial property was needed in the area; and that the adjacent landowner—having wrung from the same council the opportunity to conduct a lucrative commercial venture only three years before—feared the encroachment of competing enterprises. Indeed, two members of the council are shown by the record to have switched their votes on the matter at the final meeting, where the only evidence not previously presented to them was a bald and blunt plea for special privilege by petitioner's neighbor. (Compare R. 92 with R. 95-98.)

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[9] Long ago, Chief Justice Waite observed in *Chapman* v. *Goodnow's Admr.*, 123 U. S. 540, 548 (1887), that "a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action". Denial of a constitutional right by evading a direct decision thereon is precisely what the North Carolina Supreme Court has done here.

It is, of course, not uncommon in America for the elected representatives of the people to ignore the need of some while catering to the greed of others; and in the normal case, it is rightly said that there is always recourse to the ballot box. But this is not the normal case, nor was the elected body acting legislatively here. Under the state statute authorizing the zoning of private property, the municipal body was not prescribing the conduct of *all* its constituents, but adjudicating here the property rights of *one*. When its actions, in that capacity, are repugnant to every concept of justice, fair play and equal treatment which Americans revere, the citizen affected can look only to the courts for redress.

The constitutional questions timely raised here should not have been evaded by a recitation of homilies about the legislative process, separation of powers, or the limitations of *certiorari*; nor should novel and subtle refinements of an already vague state procedure deter this Court from affording petitioner a review, on the merits, of the county court judgment upholding—on no cited grounds—the capricious and confiscatory acts of the local zoning authority.

CONCLUSION

Petitioner respectfully submits that the serious conflict between the action of the municipal body and established constitutional principles—including the long-standing decision of this Court in *Nectow* v. *Cambridge*, *supra*, involving basically identical facts—urgently require that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

SAMUEL R. PIERCE, JR.,
Attorney for Petitioner.

CHARLES B. MARKHAM,
BLACKWELL M. BROGDEN,
of Counsel.

APPENDIX A

The constitutional provision herein involved is Section 1 of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

* * *

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

(1) Order in the Superior Court of Durham County

ORDER (HEMAN R. CLARK, *J.*, Oct. 20, 1961)

THIS CAUSE coming on to be heard upon Motion of the respondents to dismiss the proceedings, and it appearing that the sole question presented is whether or not it is proper for this Court to review upon a writ of certiorari the action of the City Council of the City of Durham, a municipal corporation, in declining to amend the zoning ordinance upon the petition of a property owner to change the classification of her property wherein her petition for the writ she alleges that the action of the Council was invalid, being arbitrary, unreasonable and confiscatory; and it being the opinion of this Court that while the decision of the municipal authority as to the amendment of a valid zoning ordinance is a legislative function, usually not to be reviewed by the Courts, where it clearly appears that a refusal to amend would result in the enforcement of an arbitrary, oppressive and confiscatory zoning ordinance, in no way related to public health, comfort, safety or welfare, a question of the validity of the proceeding arises which is properly reviewable by the Courts upon a writ of certiorari, the scope of the inquiry being limited to whether or not upon the face of the record the action of the City Council was clearly invalid as alleged.

NOW THEREFORE, Respondents' Motion to Dismiss is denied. This the 20th day of October, 1961.

s/ HEMAN R. CLARK,
Judge Presiding.

(2) Judgment in the Superior Court of Durham County

JUDGMENT

This cause coming on to be heard upon the record certified to this Court by the City Clerk of the City of Durham pursuant to a Writ of Certiorari issued by Judge Heman Clark upon Petition for Writ of Certiorari heretofore filed as appears in the record, and upon stipulations of Counsel and facts included in such stipulations and being fully argued to the Court by Blackwell M. Brogden and Charles B. Markham, Esqs., Attorneys for petitioner, and by Claude V. Jones, Esq., Attorney for respondents;

The Court being of the opinion that this case is properly to be considered upon the record of proceedings before the Planning and Zoning Commission of the City of Durham, and the record of proceedings before the City Council of the City of Durham, including the attached exhibits and the stipulations of Counsel, and being further of the opinion that the scope of review is as declared by the Supreme Court of North Carolina in *Helms v. Charlotte*, 255 N. C. 647 (1961), as follows: As a general rule a zoning ordinance of a municipality is valid and enforceable if it emanates from ample grant of power by the Legislature to the city or town, if it has a reasonable tendency to promote the public safety, health, morals, comfort, welfare and prosperity, and if its provisions are not arbitrary, unreasonable or confiscatory. But there is always a marginal area where it is difficult to say that the preference of the public interest over private interest opposing zoning is reasonable and constitutional. In this marginal area each case must be determined on its own facts. When it is shown that a zoning ordinance has been adopted by the governing board of a municipality, there is a presumption in favor of the validity of the ordinance and the burden is upon the complaining property owner to show its invalidity or inapplicability.

Judgment in the Superior Court of Durham County.

The mere fact that a zoning ordinance seriously depreciates the value of complainant's property is not enough, standing alone, to establish its invalidity. When the most that can be said against such ordinance is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare.

And the Court being of the opinion that upon the record the question of whether the decision of the City Council of the City of Durham in refusing to amend its zoning ordinance as requested by Petitioner is an unreasonable, arbitrary, or unequal exercise of power, or is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion, or contravenes the North Carolina or United States Constitutions, is fairly debatable and that the clear invalidity of the action of the City Council has not been shown.

It Is Therefore Ordered that the Writ herein be dismissed and the action of the City Council is affirmed. The costs of this proceeding are taxed against Petitioner.

Henry A. McKinnon, Jr.,
Judge Presiding.

(3) Opinion of the Supreme Court of North Carolina

(Filed Jun 14 1963 in the Office of Clerk Supreme Court of North Carolina)

NORTH CAROLINA SUPREME COURT

SPRING TERM—1963

No. 676—Durham

—o—

In the Matter of

SADIE H. MARKHAM,

Petitioner.

—o—

Appeals by petitioner and respondents from McKinnon, J., December Civil Session 1962 of Durham.

The appeals involve petitioner's request that her property in Durham, North Carolina, be rezoned.

Petitioner's property consists of four undeveloped tracts or parcels of land, all north of Club Boulevard and south of U. S. 70 Bypass and between Watts Street and Guess Road. Tract 1 (0.8 acre) and Tract 3 (3.5 acres), between Watts Street and Buchanan Boulevard (Extension), are now classified in R-8 (One Family Residence) Zone. Tract 2 (0.6 acre) and Tract 4 (1.2 acres), between Buchanan Boulevard (Extension) and Guess Road, are now classified in RA-16-24 (Apartment Residence) Zone. (Note: A lot or parcel of land now (*sic*) owned by petitioner lies between Tract 1 and Tract 3 and another such lot or parcel lies between Tract 2 and Tract 4.) At all times since the adoption in 1926 of the Durham Zoning Ordinance petitioner's said land has been zoned for residential purposes.

On June 28, 1960, petitioner, by letter to the City Planning and Zoning Commission (Commission), requested that

her property be rezoned and classified in C-1 (Local Community Commercial) Zone. (Note: Thereafter she amended her request and asked that her property be classified in either C-1 Zone or in C-1A (Shopping Center Commercial) Zone.) After consideration thereof at its meeting on July 19, 1960, the Commission recommended to the City Council of Durham (Council) that petitioner's request be denied. Thereafter, the Commission granted petitioner's motion for a reconsideration of her request. On October 18, 1960, after a further hearing, the Commission again recommended to the Council that petitioner's request be denied.

On November 7, 1960, notwithstanding the Commission's recommendation, the Council voted to call a public meeting to hear and act upon petitioner's request. At this meeting, held November 21, 1960, petitioner amended her request by asking, in the alternative, that only Tract 3 be rezoned. Arguments in favor of petitioner's request were presented. Petitioner's request was opposed by an attorney appearing on behalf of Northgate Shopping Center, Inc., owner of adjacent property. At the conclusion of the hearing, the Council "denied petitioner's request for an ordinance rezoning her property."

On November 29, 1960, Clark (Heman R.), J., upon petitioner's application therefor, issued a writ of *certiorari* to the City Clerk reciting that petitioner had applied for such writ "to review the action of the City Council of the City of Durham in denying her requested amendment to the City Zoning Ordinance reclassifying her property on Watts Street to a commercial zone." The City Clerk was directed "to certify or cause to be certified and return to this Court the record in the said matter and to include in such record the minutes of the meeting of the City Council of November 21, 1960, and all affidavits, maps, plats, and all other evidence presented." A notice that petitioner would apply for such writ and a copy of the petition therefor were served on the Mayor.

On December 8, 1960, "the City of Durham, the City Council of the City of Durham, and the City Clerk of the City of Durham, appearing specially only for the purpose of the Motion and for no other purpose", moved that the proceeding be dismissed on the ground the Council's decision "not to pass an ordinance amending its zoning ordinance is not reviewable by the Courts by means of a Writ of Certiorari as a substitute for an appeal." This motion is signed by C. V. Jones as "Attorney for Respondents." It was denied October 20, 1961, by order of Clark, (Heman R.), J., and respondents excepted. Thereafter, "the respondents, City of Durham, E. J. Evans, Mayor, Luther Barbour, Bascom Baynes, Walters Biggs, Mrs. R. O. Everett, Vance Fisher, Floyd Fletcher, James R. Hawkins, Charles Steele and J. S. Stewart, members of the City Council of the City of Durham, and Elsie N. Jones, City Clerk of said City", expressly reserving "all rights under their Motion to Dismiss Proceeding heretofore filed in this proceeding, and under the Exception duly noted to the action of the Court in overruling said motion and signing the order dated October 20, 1961", answered the allegations of the petition for writ of *certiorari*.

The cause was heard by McKinnon, J., "upon the record certified to this Court by the City Clerk of the CITY OF DURHAM pursuant to a Writ of Certiorari issued by Judge Heman Clark upon Petition for Writ of Certiorari heretofore filed as appears in the record, and upon stipulations of Counsel and facts included in such stipulations * * *." The judgment recites, *inter alia*, the following: "The Court being of the opinion that this case is properly to be considered upon the record of proceedings before the Planning and Zoning Commission of the City of Durham, and the record of proceedings before the City Council of the City of Durham, including the attached exhibits and the stipulations of Counsel, * * *." Again: "And the Court being of the opinion that upon the record the question of whether

the decision of the City Council of the City of Durham in refusing to amend its zoning ordinance as requested by Petitioner is an unreasonable, arbitrary, or unequal exercise of power, or is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion, or contravenes the North Carolina or United States Constitution, is fairly debatable and that the clear invalidity of the action of the City Council has not been shown . . . ."

Judge McKinnon entered judgment as follows: "IT IS THEREFORE ORDERED that the Writ herein be dismissed and the action of the City Council is affirmed."

Petitioner excepted to said judgment and appealed. Her specific exception is in these words: "To the conclusion of the Court that upon the record as certified by the City Clerk of the City of Durham the question of whether the decision of the City Council of the City of Durham in refusing to amend its Zoning Ordinance as requested by the petitioner is an unreasonable, arbitrary, or unequal exercise of power, or is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion, or contravenes the North Carolina or United States Constitutions, is fairly debatable and that the clear invalidity of the action of the City Council has not been shown, THE PETITIONER OBJECTS AND EXCEPTS."

Respondents excepted and appealed. Their specific exception is in these words: "Respondents except to so much of the Judgment signed by the Court as holds that this case is properly considered upon the Writ of Certiorari and that the Court has jurisdiction to hear and determine the case upon such Writ. EXCEPTION OVERRULED, AND RESPONDENTS APPEAL to the Supreme Court of North Carolina from such ruling and from the Judgment of Heman Clark, Judge, Superior Court, from which an exception was preserved as appears in the record."

BLACKWELL M. BRIGGEN and CHARLES B. MARKHAM for petitioner.

CLAUDE V. JONES for respondents.

BOBBITT, J. The question presented by respondents' appeal, as stated in the briefs, is this: "May a decision of the Durham City Council, reached after public hearing in accordance with the zoning ordinances and statutes, not to amend its existing zoning ordinance so as to change certain property located in Residence and Apartment Residence Zones to a Commercial Business Zone, be reviewed directly by the Superior Court by means of Certiorari directed to the City Council, in the absence of statutory provision for such procedure?"

"At common law and under the practice in most jurisdictions, the writ of certiorari will lie to review only those acts which are judicial or quasi judicial in their nature. It does not lie to review or annul any judgment or proceeding which is legislative, executive, or ministerial rather than judicial. The writ does not lie to review the action of an inferior tribunal or board in the exercise of purely legislative functions." 10 Am. Jur., Certiorari § 10; 14 C. J. S., Certiorari § 18(b).

The writ of certiorari issues only to review the judicial or quasi-judicial action of an inferior tribunal, commission or officer. Pue v. Hood, Comr. of Banks, 222 N. C. 310, 312, 22 S. E. 2d 896; Belk's Department Store, Inc. v. Guilford County, 222 N. C. 441, 23 S. E. 2d 897; S. v. Simmington, 235 N. C. 612, 613, 70 S. E. 2d 842; Realty Co. v. Planning Board, 243 N. C. 648, 655-656, 92 S. E. 2d 82.

The General Assembly has delegated to "the legislative body" of cities and incorporated towns the power to adopt zoning regulations and, from time to time, to amend or repeal such regulations. G. S. 160-172 *et seq.*; Marrón v.

Gamble, 237 N. C. 689, 75 S. E. 2d 880; In re O'Neal, 243 N. C. 714, 92 S. E. 2d 189.

The "legislative body" of the City of Durham is its City Council. "Municipal ordinances are ordained for local purposes in the exercise of a delegated legislative function * * *." S. v. Freshwater, 183 N. C. 762, 111 S. E. 161. "In enacting a zoning ordinance, a municipality is engaged in legislating * * *" Marren v. Gamble, supra. It may amend or repeal such ordinance only by acting legislatively. Paliotto v. Harwood, 217 N. Y. S. 2d 864. When acting upon a request for amendment of its zoning ordinance, the City Council of Durham acts in its legislative capacity and not in a judicial or quasi-judicial capacity.

In Rheinhardt v. Yancey, 241 N. C. 184, 84 S. E. 2d 655, the plaintiffs sought to restrain the members of the City Council of Gastonia from passing an ordinance relating to annexation. This Court, in ordering the temporary restraining order dissolved, said: "Ordinarily, equity deals with conduct, actual or threatened, not with how the members of legislative bodies vote. In reaching the conclusion stated, we are mindful of the importance of keeping in proper relation and in careful balance the power and authority vested in our distinct, coordinate departments of government, legislative, executive and judicial; for, whatever may be the merits of plaintiffs' cause, a contrary rule would open the door to suits to restrain the adoption of ordinances to such extent as to interfere seriously with the proper functioning of the legislative body. Too, a contrary rule, if carried to its logical conclusion, would warrant, if sufficient facts were alleged, judicial restraint of members of the General Assembly from the passage of legislation alleged to be in conflict with provisions of our organic law. This cannot be done." It was held in State v. Hardy (La.), 157 So. 130, the court had no jurisdiction to hear a suit to restrain a city council from passing an amendment to its

zoning ordinance reclassifying certain property in such manner as to permit its use for commercial purposes.

The legal principles stated in the quotation from Rheinhardt apply equally where the plaintiff seeks by mandamus or mandatory injunction to compel a municipal "legislative body" to enact, amend or repeal an ordinance relating to zoning. Northwood Properties Co. v. Perkins (Mich.), 39 N. W. 2d 25; Paliotto v. Harwood, supra. In Northwood, *the action* was for a writ of mandamus directing the defendant city inspector to issue to the plaintiff a building permit for the erection of multiple dwellings on certain property owned by the plaintiff and directing the defendant city, mayor, and city commissioners to amend the city zoning ordinance by changing said property from a residence "A" classification, in which single residences only were permitted, to a residence "B" classification where the erection of multiple dwellings was permitted. On the defendants' appeal, the judgment of the lower court ordering issuance of such writ was reversed. The court, in opinion by Dethmers, J., said: "While it is within the province of the courts to pass upon the validity of statutes and ordinances, courts may not legislate nor undertake to compel legislative bodies to do so one way or another. (Citations) The court erred in seeking to compel the defendant mayor and city commission members to amend the ordinance."

"The courts may not interfere with or control a municipality's zoning power or direct zoning ordinances to be repealed, enacted, or amended." 101 C. J. S., Zoning § 323, pp. 1115-1116; Randall v. Township Board of Meridian Township (Mich.), 70 N. W. 2d 728; Northwood Properties Co. v. Perkins, supra; Paliotto v. Harwood, supra; Schoenith v. City of South Miami (Fla.), 121 So. 2d 819; State v. Hardy (La.), supra; People v. City of Rockford (Ill.), 87 N. E. 2d 669; Dunbar v. City of Spartanburg (S. C.), 85 S. E. 2d 281; Lang v. Town Council (R. I.), 108 A. 2d 166; Beauregard v. Town Council (R. I.), 107 A. 2d 283;

Herzog v. City of Pocatello (Idaho), 363 P. 2d 188; Edward H. Snow Const. Co. v. City of Albuquerque (N. M.), 333 P. 2d 877; State v. City of Raytown (Mo.), 289 S. W. 2d 153. In Herzog, after the Board of Commissioners had denied the owner's request that his property be rezoned, the owner (plaintiff) instituted "this action seeking to compel appellant city to permit respondents to use their said property for the purpose of constructing and maintaining an automobile service station thereon."

"In the absence of statutory authority therefor, certiorari usually is not a proper remedy to test the legislative action of a municipality as to zoning." 101 C. J. S., Zoning § 335. Specifically, it has been held that the refusal by a city council to amend the zoning ordinance to change the classification of specific property in accordance with the request of the owner was an exercise of its legislative function and not subject to judicial review on *certiorari*. Dunbar v. City of Spartanburg, supra; Lang v. Town Council, supra; Beauregard v. Town Council, supra. Upon like ground, it has been held that the enactment by a municipal legislative body of an ordinance rezoning property is not subject to judicial review on *certiorari*. Edward H. Snow Const. Co. v. City of Albuquerque, supra; State v. City of Raytown, supra.

We are advertent to decisions in New Jersey in which it is held that *certiorari* is the appropriate remedy to test the reasonableness of a zoning ordinance. Brown v. Tp. of Irvington (N. J.), 18 A. 2d 73. The New Jersey procedure as set forth in Payne v. Borough of Sea Bright (N. J.), 187 A. 627, is approved in Eastern Boulevard Corporation v. Board of Com'rs of Town of West New York (N. J.), 11 A. 2d 832. See also Cliffside Park Realty Co. v. Borough of Cliffside Park (N. J.), 114 A. 797. It would serve no useful purpose to discuss the distinctive features of the New Jersey procedure.

We have considered the decisions referred to in the excellent briefs filed in behalf of petitioner. However, we find no decision in New Jersey or elsewhere in which the failure of a city council to enact a proposed amendment to a zoning ordinance has been successfully challenged by *certiorari* or otherwise.

The Planning and Zoning Commission (GS 160-22 *et seq.* and GS 160-177) had no legislative, judicial or quasi-judicial power. Its report (recommendation) did not restrict or otherwise affect the legislative power of the City Council. The hearings before the Planning and Zoning Commission as well as the hearings before the City Council (GS 160-177 and GS 160-175) are required in order to afford "parties in interest and citizens" an opportunity to be heard with reference to *proposed legislation*. Whether the zoning ordinance should be amended as requested by petitioner was for determination by the City Council in the exercise of its purely legislative function.

The Planning and Zoning Commission is separate and distinct from the Board of Adjustment appointed in accordance with GS 160-178. The Board of Adjustment "is clothed, if not with judicial, at least with *quasi*-judicial power, it being its duty to investigate facts and from its investigation to draw conclusions as a basis of official action and to exercise discretion of a judicial nature." Harden v. Raleigh, 192 N. C. 395, 135 S. E. 151; Lee v. Board of Adjustment, 226 N. C. 107, 37 S. E. 2d 128, 168 A. L. R. 1. Even so, it "is not a law-making body," and may not disregard zoning regulations adopted by the "legislative body," to wit, the City Council. "It can merely 'vary' them to prevent injustice when the strict letter of the provisions would work 'unnecessary hardship'." Lee v. Board of Adjustment, supra. "Every decision of such board shall, however, be subject to review by proceedings in the nature of certiorari." GS 160-178; In re Pine Hill Cemeteries, Inc., 219 N. C. 735, 15 S. E. 2d 1; Lee v. Board

of Adjustment, supra; Chambers v. Board of Adjustment, 250 N. C. 194, 198, 108 S. E. 2d 211; Jarrell v. Board of Adjustment, 258 N. C. 476, 480, 128 S. E. 2d 879.

The statute (GS Chapter 160, Article 14) contains no provision for judicial review by *certiorari* or otherwise of the action of the "legislative body" of cities and towns with reference to the enactment, amendment or repeal of zoning regulations.

We have not overlooked Bryan v. Sanford, 244 N. C. 30, 92 S. E. 2d 420, where this Court, as stated correctly in the third headnote in our Reports, held: "Mandamus will lie to compel a municipality to zone one of four corners at an intersection in the same manner as it had zoned two other corners at the intersection, such action being a ministerial duty of the city under GS 160-173." In the specific factual situation described therein, GS 160-173 expressly deprives a city council of its legislative discretion and authority.

Pursuant to petitioner's request, hearings were held in accordance with statutory procedure. No action was instituted by petitioner against the City of Durham or against its Mayor or against the members of its City Council. Until the City Council refused to enact the (specific) ordinance submitted by petitioner, relating solely to petitioner's said property, petitioner sought to invoke the legislative powers of the City Council. Neither the City of Durham nor its Mayor nor the members of its City Council were in the position of adverse litigant. They were cast in this new role when the motion (under special appearance) to dismiss the writ of *certiorari* was overruled and they were required to answer the allegations of the petition for *certiorari*.

For the reasons stated, we are of opinion, and so decide, that the court had no jurisdiction to review on *certiorari* or otherwise the City Council's failure to amend the zoning ordinance as requested by petitioner. The said motion

of "respondents" should have been allowed. The court was in error in undertaking to pass upon the "merits" of petitioner's asserted grievance. Hence, the judgment affirming *the action* (in refusing to enact the requested ordinance) of the City Council is vacated; and the proceeding is remanded to the superior court for entry of an order dismissing the writ of *certiorari* and the petition therefor.

The real controversy would seem to be whether the zoning ordinance now in effect is invalid as to petitioner's property. Appropriate procedures are available for a judicial determination thereof. Clinard v. Winston-Salem, 217 N. C. 119, 6 S. E. 2d 867, 126 A. L. R. 634; Raleigh v. Morand, 247 N. C. 363, 100 S. E. 2d 870; Penny v. Durham, 249 N. C. 596, 107 S. E. 2d 72; Helms v. Charlotte, 255 N. C. 647, 122 S. E. 2d 817.

Error and remanded.

JUDGMENT
SUPREME COURT OF NORTH CAROLINA

IN THE MATTER OF SADIE H. MARKHAM, Petitioner

/s/

SPRING TERM, 19 63

No. 676 Durham County.

This cause came on to be argued upon the transcript of the record from the Superior Court Durham County;

Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Wm. H. Bobbitt I Clerk, certified by the said Superior Court to the effect that the case is remanded for errors indicated in said opinion

And it is considered and adjudged further, that the petitioner and surety to the appeal bond, Fidelity & Deposit Company of Maryland, do pay the costs of the appeal in this Court incurred, to-wit, the sum of Fifty-Nine and 05/100 Dollars ($ 59.05), and execution issue therefor. Certified to Superior Court this 21st day of June 19 63

A TRUE COPY

Adrian J. Newton
Clerk of the Supreme Court.
By s/ Sarah B. Hanner
Sarah B. Hanner, Deputy Clerk

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FILED
OCT 10 1963
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1963

No. 464

In The Matter of
SADIE H. MARKHAM,
Petitioner.

BRIEF OF RESPONDENT, CITY OF DURHAM, NORTH CAROLINA, IN OPPOSITION TO GRANTING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

CLAUDE V. JONES,
Attorney for Respondent
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Durham, North Carolina

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In The

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No. 464

In The Matter of

SADIE H. MARKHAM,

Petitioner.

NO FEDERAL QUESTION IS INVOLVED

As stated by Justice Bobbitt of the North Carolina Supreme Court, the question decided by that Court was

> "May a decision of the Durham City Council, reached after public hearing in accordance with the zoning ordinances and statutes, not to amend its existing zoning ordinance so as to change certain property located in Residence and Apartment Residence Zones to a Commercial Business Zone, be reviewed directly by the Superior Court by means of Certiorari directed to the City Council, in the absence of statutory provision for such procedure?"

The Supreme Court of North Carolina, in its Opinion handed down June 14, 1963, and reported in 259 NC 566, 131 SE2d 329, (pp. 5a-15a, Appendix B., Petition for Writ of Certiorari filed by Petitioner) simply held that under the laws of North Carolina the answer to that question is "No".

Such decision does not infringe upon any constitutional or statutory right of Petitioner with regard to the use of her property. Indeed, the North Carolina Supreme Court pointed out (p. 15a, Appendix B.) that appropriate procedures are available to the Petitioner for a judicial determination of the controversy as to whether the zoning ordinance now in effect is invalid as to Petitioner's property.

The decision of the Supreme Court of North Carolina in interpreting the applicable law and answering the foregoing

question is determinative of that question in this case. Certainly, the Petitioner has no right guaranteed by any constitutional provision to require the Court to have answered the question in the affirmative.

Therefore, Respondent respectfully submits that the Petition for Writ of Certiorari filed by Petitioner should be denied.

THE SEVEN QUESTIONS ASSERTED BY PETITIONER AS BEING INVOLVED ARE NOT INVOLVED ON THIS PETITION

Petitioner lists seven questions which she says are presented by her Petition for the Writ. (Petition, pp. 2-3). It is respectfully submitted that not a single one of these questions is actually involved or before this Court on the Petition for the Writ for these reasons:

Questions, 1, 2 and 3 have no reference whatever to the question decided by the North Carolina Supreme Court, whose Opinion is here sought to be reviewed. These questions go to the contention of Petitioner that the action of the Durham City Council was arbitrary, etc., and therefore invalid, *which questions were not reached or passed upon* by the North Carolina Supreme Court.

However, even if such questions were before the Court *there was evidence sufficient to sustain the action of the City Council* as against charges of arbitrary, capricious, unreasonable and confiscatory action levelled against it. For example, the zoning ordinance was before the Council and the Court (Ex. 45). Also before the Council and the Court as Ex 1-C was a map showing Petitioner's four tracts of land here involved. Tracts 1 and 3 are in R-8 Residential Zone and Tracts 2 and 4 are in RA-16-24 Apartment Zone. (Rp 10). From these facts which are before the Court it is shown by computation, according to sections 3 and 4 of R-10 and R-8 required lot area of the zoning ordinance, that

(a) on Tract 1, one single family residence can be erected

fronting Watts Street and another single family residence can be erected fronting Buchanan Boulevard, so that there is sufficient room on the lot on which *two* single family residences can be built on this tract in compliance with the zoning ordinance.

(b) on Tract 3, containing 3.5 acres and fronting about 640 feet along Watts Street and 516 feet along Buchanan Boulevard, by reference to the same section of the ordinance it is shown that the area is sufficient to be cut into 13 separate lots upon which *thirteen* single family residences may be built in compliance with the zoning ordinance.

Also, by reference to section 9 of the zoning ordinance, RA-16-24 Apartment Residence Zone, and a specific reference to subsection C thereof relating to density, it is shown that

(c) on Tract 2 there can be constructed a *10-unit apartment* building, or, with smaller units, a *15-unit apartment* building, complying with the zoning requirements;

(d) While on Tract 4, a reference to the same section shows that from *20 to 30 apartment units* can be erected in compliance with the zoning ordinance.

These facts were before the City Council, and they do not bear out the contention of Petitioner that her property is "valueless for residential purposes", and that the action of the City Council in not changing the zone was arbitrary, capricious, unreasonable, confiscatory, and unconstitutional. At the very least, the question is fairly debatable.

Question 4 ignores the fact that Petitioner has no constitutional or statutory right to require the Court to hold that she may present her case in a way which is contrary to the course and practice of the Courts, and in a way which confers no jurisdiction on the Court to review a decision of a legislative City Council by direct appeal.

Question 5 assumes that the decision of the Supreme Court of North Carolina is erroneous because it "ignored its own

precedents of long standing", and *thereby evaded* a decision on constitutional questions which Petitioner says are involved in the case. Such assumption is untenable because it gives no weight to the effect of North Carolina General Statutes 1-134.1, which provides that any interested party shall have the right of appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant; and ignores the ancient vintage of the cases Petitioner cited (Hillsboro v Smith, 1891; Bank v Burns, 1899) and the fact that none of those cases were zoning cases; and, finally, all of those cases and the statutes were before the North Carolina Supreme Court and due consideration given to them by the Court in reaching its decision. Petitioner could argue, as her counsel did, that the Court should hold that Respondent had no right to be heard on appeal from a ruling of the Superior Court that the Court had jurisdiction, *but she has no constitutional right to require the Court to accept her argument.* The statement that the Court reached the decision it did in order to "evade" a decision on constitutional grounds is pure fantasy.

Question 6 asserts that the decision was based on "untenable grounds", etc., all of which is pure argument and wishful thinking on the part of counsel for Petitioner. Here, again, there is no constitutional right of Petitioner infringed upon by the disenchantment of the Court with her contentions.

Question 7 erroneously assumes that the decision of the North Carolina Supreme Court requires Petitioner to violate the ordinance in order to obtain a judicial determination of her rights. Nothing in that Opinion justifies such assumption. The Court suggests that there are appropriate procedures available to her, and nowhere does it advise her to violate the law before such procedures may be available.

On this point, it is well to note that Petitioner has cited and places great reliance upon the case of *Nectow v Cambridge*, 277 U. S. 183 (1928), which she says involves identical facts. Since she is apparently wedded to that case, she might follow the same procedure which was followed there; and,

instead of trying to appeal to the Courts directly from the legislative action of a city council and trying to force the Court to assume jurisdiction which it does not have, she might, as was done in the *Nectow* case, institute a suit for a mandatory injunction directing the City and its inspector of buildings to pass upon an application of plaintiff in error for a permit to erect any lawful buildings upon a tract of land without regard to the provisions of the ordinance including such tract within a residential zone. (And it might be of interest to point out that in that case the matter was referred to a Master, who, after hearing the evidence, made certain findings of fact, which the Court adopted on appeal).

Thus, it is demonstrated that, instead of being authority in support of Petitioner, the *Nectow* case is authority for the position of Respondent that the way for Petitioner to proceed was (1) to institute a suit for a mandatory injunction for a building permit, or (2) for an injunction restraining the City from enforcing the zoning ordinance as to Petitioner's property on the ground that as to her the ordinance is invalid and unenforceable, or (3) for Petitioner to start building a commercial building and have the City institute an action to enjoin her from doing so. At least two of these available procedures do not require the Petitioner to violate the ordinance in order to present her case for determination.

CONCLUSION

It is respectfully submitted

(1) That the decision of the North Carolina Supreme Court that a decision of the Durham City Council, reached after public hearing in accordance with the zoning ordinances and statutes, not to amend its existing zoning ordinance as requested by Petitioner, may not be reviewed directly by the Courts by means of Certiorari directed to the City Council in the absence of statutory provision for such procedure, is determinative of the question.

(2) That no Federal question is involved which calls for

review of the decision of the North Carolina Court by this Court.

(3) That there are available procedures open to Petitioner to secure a judicial determination of her right to use her property for commercial purposes, if she desires to make use of them.

(4) That the Court should deny the Petition for the Writ filed by Petitioner herein.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1963

No. 464

In the Matter of
SADIE H. MARKHAM,
Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1963

No. 464

In the Matter of

SADIE H. MARKHAM,

Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Argument

Petitioner submits this Reply Brief to correct several mis-statements of law and incorrect interpretations of the facts set forth in the respondent's Brief in Opposition to the Petition for Writ of Certiorari.

At page 2 of the Brief in Opposition, respondent suggests that the constitutional questions set forth as Questions 1, 2 and 3 of the Petition "have no reference whatever to the question decided by the North Carolina Supreme Court, whose Opinion is here sought to be reviewed."

Respondent completely misses the point. It is not necessary for certiorari to issue that the North Carolina Supreme Court have "reached or passed upon" Federal constitutional questions. In 28 U. S. C., §1257(3), jurisdiction is conferred upon this Court to review the final judgments of the highest court of a State "by writ of certiorari * * * where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution * * * or where any title, right, privilege

or immunity is specially set up or claimed under the Constitution."[1]

A municipal ordinance is a "state statute" within the meaning of this section. *Jamison* v. *Texas*, 318 U. S. 413 (1943). Federal constitutional questions were clearly drawn in the Supreme Court of North Carolina (R. 140, 142). As we pointed out extensively in our Petition (pp. 19-37), the fact that the Supreme Court of North Carolina chose to ignore the constitutional questions (though conceding such was the "real controversy," App. B to Pet., p. 15a) does not deprive this Court of jurisdiction to determine those questions. We need not repeat here the argument developed in the Petition that the "adequate state ground" rule has no application in this case. We believe it of great significance, however, that respondent's Brief in Opposition cites no case in opposition to the legal theories presented and cases cited in our Petition on this point. Respondent's discussion of the issue, in fact, is confined to about one page of the brief.

At pages 2 and 3 of the Brief, respondent attempts to challenge the arbitrary character of the zoning ordinance involved by pointing out that petitioner's property has sufficient area to erect two single family residences on Tract 1; 13 single family residences on Tract 3; a 10 or 15-unit apartment building on Tract 2; and a 20 to 30-unit building on Tract 4. Respondent begs the question. The issue is not whether petitioner or her lessee could erect residence units on these tracts, and if so, how many. The issue is whether, in view of the commercial character of the sur-

[1] Rule 19 of the Rules of this Court provide that the cases to be considered for a writ of certiorari include a situation "where a state court has decided a federal question * * * in a way probably not in accord with applicable decisions of this court." Here, a state court, the Superior Court of Durham County, decided the case in a manner squarely in conflict with the decision of this Court in *Nectow* v. *Cambridge*, 277 U. S. 183 (1928).

rounding area, any reasonable person would desire to *reside in* such units; in other words, whether the property has any *value* for residential use. The uncontradicted evidence is that it does not, as indicated by the unchallenged opinions of seven real estate experts (R. 76-79, R. 84-86, R. 4-5). Corroborating these opinions is a mass of photographic evidence (Exhs. 4-B, 4-C, 4-D, 4-E, 4-F, 28-38) depicting the character of the neighborhood. It is obvious from these photographs alone that residence units on petitioner's property would have no appeal for a prospective buyer or tenant.

Finally, on this point, respondent is in error when it contends (Br., p. 3) that "these facts" (the number of houses or apartments which could be erected on petitioner's land) "were before the City Council." The official record of the Council meetings contains no reference to discussion of such facts (R. 91-98) and, indeed, there was no discussion of them until oral argument in the North Carolina Supreme Court; they are before this Court only "by computation." Respondent has gone outside the record in advancing this argument.

At page 4 of the Brief, respondent charges that petitioner's argument "gives no weight to the effect of North Carolina General Statutes 1-134.1, which provides that any interested party shall have the right of appeal from an adverse ruling as to the *jurisdiction of the court over the person or property of the defendant*" (Emphasis added). This contention may be summarily dismissed. At no stage of this case has respondent challenged (or any court ruled upon) the jurisdiction of the court over the person or property of the defendant, implying improper service of process; respondent's challenge has been to the *jurisdiction of the court over the subject matter of the action*, to which G.S. 1-134.1 does not apply.

In suggesting in accord with the North Carolina Supreme Court's observation that there are appropriate pro-

cedures by which petitioner could have contested the ordinance in question, respondent cites *Nectow* v. *Cambridge*, *supra*, as a proper example for her to follow (Br., pp. 4-5). Obviously, the procedures available to an aggrieved landowner in Massachusetts are not available to a citizen and resident of North Carolina. The petitioner here was guided by what reasonably appeared to be the procedural law of North Carolina. As amply demonstrated in the Petition (p. 33), as well as by the North Carolina Supreme Court's exhaustive discussion of the subject (App. B, p. 11a), mandatory injunction—the action brought by Nectow—is not available to a property owner seeking to test the validity of a North Carolina zoning ordinance. The remainder of respondent's contentions on this point are fully discussed in the Petition.

CONCLUSION

It is respectfully submitted that the respondent's Brief in Opposition contains no discussion of the facts or of the legal issues involved, sufficient to negate, or overcome, the urgent reasons set forth in our Petition for review by this Court of the constitutional questions involved.

Respectfully submitted,

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